

***929 THE CITIZEN SUIT PROVISION OF CERCLA: A SHEEP IN WOLF'S CLOTHING?**

Jeffrey M. Gaba [FN1]
Mary E. Kelly [FNaa]

Copyright 1990 by the Southern Methodist University; Jeffrey M. Gaba; Mary E. Kelly

SINCE the early days of the modern environmental movement, citizen litigation has played a central role in shaping and enforcing environmental requirements in this country. Through the use of such provisions as "informer rewards," [FN1] judicial review under provisions of the Administrative Procedure Act, [FN2] and specific statutory causes of action under various statutes, [FN3] citizens have not only sought to abate environmental pollution, but also to compel or constrain government action. Congress has repeatedly recognized the important role that citizens, acting essentially as "private attorneys general," play in implementing environmental requirements. [FN4] Today, almost every major federal environmental statute has some *930 form of "citizen suit" provision that authorizes legal action by a broadly defined class of citizens. [FN5]

Until recently, the Comprehensive Environmental, Response, Compensation, and Liability Act [FN6] (CERCLA or Superfund) stood virtually alone as the only environmental statute that lacked a citizen suit provision. This absence was surprising. CERCLA is one of the major federal statutes defining the requirements for the cleanup of hazardous substances; it is largely through CERCLA that the government deals with the widespread public concern about the presence of hazardous wastes in the environment. [FN7] CERCLA has become a major aspect of commercial dealings in this country. [FN8] The scope of potentially liable parties under CERCLA is very broad, [FN9] and cleanup costs routinely range into the millions of dollars. [FN10] Thus, the absence of a citizen suit provision specifically authorizing public challenges to actions under CERCLA was a major gap in the central role of citizens under U.S. environmental policy.

Congress responded to this gap in 1986 by adopting a specific citizen suit provision for CERCLA. In the Superfund Amendments and Reauthorization Act (SARA) Congress added a new section 310 to CERCLA that authorizes citizen suits against persons violating the requirements of CERCLA *931 and against the federal government for its failure to perform nondiscretionary duties. [FN11] Although the language of section 310 is similar to the language in citizen suit provisions of other federal environmental statutes, its effect is not. While citizen suit provisions under other statutes have given citizens important tools to challenge private and government actions, [FN12] section 310 may have only a limited role in implementing the environmental objectives of CERCLA. The citizen suit provision of CERCLA may prove to be a sheep in wolf's clothing.

Section 310 may be of limited significance for two reasons. First, although section 310 authorizes actions against persons violating the requirements of CERCLA, the statute contains few self-implementing requirements. [FN13] CERCLA, in most cases, requires the cleanup of hazardous substances only after the government has first issued a cleanup order. [FN14] Thus, in the absence of prior government action, citizens may not be able to use the citizen suit provision to compel the cleanup of hazardous substances. Second, although section 310 may authorize challenges to government cleanup decisions; section 113(h), which deals with the "timing" of judicial review under CERCLA, may prevent those challenges from being brought until after the government has completed the cleanup of a site. [FN15]

This Article addresses the role of citizen suits under CERCLA. Section one describes the basic structure of CERCLA and the citizen suit provisions of section 310. Section two discusses the scope of section 310 and describes the possible violations of CERCLA for which a citizen suit may be brought. Section 310 is likely to be used primarily to challenge whether the government's cleanup decisions comply with the requirements of CERCLA.

Section three analyzes the issue of "timing of review" and discusses the point at which a citizen suit can be brought to challenge the government's cleanup action. Case law and legislative history clearly indicate that parties liable for the cleanup of a site may not challenge government cleanup decisions until all or part of the cleanup is completed. [FN16] A significant issue remains, however, as to whether other citizens, concerned with the adequacy of the government's cleanup decision, may seek judicial review of



the decision early enough to affect that decision. [FN17] This Article suggests how section *932 310 can be interpreted to allow effective citizen participation without causing undue delay in the cleanup of hazardous substances.

I. CERCLA AND CITIZENS SUITS

A. The Structure of CERCLA

CERCLA was adopted in 1980 in response to concerns about abandoned hazardous waste sites such as Love Canal and Times Beach. [FN18] CERCLA is a complex statute that contains a variety of interrelated provisions intended to ensure the cleanup of hazardous substances in the environment. [FN19] CERCLA provides the Environmental Protection Agency (EPA) with two main options to ensure the cleanup of hazardous substances. [FN20] First, EPA may itself, under section 104, clean up a site. [FN21] The money for these cleanups comes from the "Superfund," a fund of approximately eight and a half billion dollars created by a tax falling largely on petrochemical companies. [FN22] EPA is authorized to recoup its expenses and replenish the fund by a cost recovery action where there has been a "release" of "hazardous substances" into the environment from a facility. Section 107 defines the group of potentially responsible parties (PRPs), and this group includes the current owner or operator of the facility, the past owners, transporters who brought the waste to the site, and the generators who arranged for disposal of the substances *933 at the site. [FN23] PRPs are subject to "strict liability," [FN24] and they are "jointly and severally" liable for all cleanup costs. [FN25]

EPA's ability to recover its costs is subject to certain statutory and regulatory restrictions. EPA has promulgated a National Contingency Plan (NCP) that defines the requirements for a proper cleanup action. [FN26] Additionally, EPA has published a list of the worst sites in the country, the National Priorities List (NPL), [FN27] and EPA can undertake long-term "remedial" actions in most cases only at an NPL site. [FN28]

EPA also has the authority to issue administrative orders under section 106 to compel parties to undertake the cleanup themselves. [FN29] These section 106 orders are powerful tools. Parties who violate these orders are subject to civil penalties of up to \$25,000 per day [FN30] and treble the amount of the final *934 cleanup. [FN31] As discussed below, PRPs have almost no opportunity for pre-enforcement review of these orders. [FN32]

CERCLA imposes certain substantive and procedural requirements on cleanups undertaken or approved by EPA. Section 121 requires that every cleanup remedy selected: (1) assure protection of human health and the environment; [FN33] (2) meet all "applicable" and "relevant and appropriate" requirements (ARARs) of federal and state environmental laws; [FN34] and (3) permanently and significantly reduce the volume, toxicity, and mobility of the hazardous substances to the greatest extent practicable. [FN35]

Additionally, the statute and NCP establish requirements for significant public participation in selection of the cleanup remedy. [FN36] The Act requires EPA to publish notice and a brief analysis of the proposed plan, make the plan available for public review, and provide a "reasonable opportunity" for public comment. [FN37] The notice and analysis must include sufficient information to provide a reasonable explanation of "the proposed plan and alternative proposals considered." [FN38] The statute also authorizes the award of "technical assistance" grants to persons affected by releases from an NPL site. [FN39] EPA issues its final decision setting out the appropriate cleanup remedy for a particular site in a "Record of Decision" (ROD). [FN40]

PRPs may also be liable for the costs of cleanup through private cost recovery actions. Under section 107(a)(4)(B), private parties who clean up hazardous substances can bring an action against potentially responsible parties to recover the costs of cleanup that were consistent with the NCP. [FN41] PRPs may themselves bring these actions, which may result in some form of equitable allocation or action for contribution among the parties. [FN42]

B. The Citizen Suit Provisions of Section 310

Section 310 provides that any person may commence a civil action:

- §310:
- 1) against any person . . . who is alleged to be in violation of any standard, regulation, condition, requirement, or order which has become effective . . . [under CERCLA]; or
 - 2) against the President or any other officer of the United States (including the Administrator of the Environmental Protection Agency and the *935 Administrator of the [Agency for Toxic Substances Disease Registry (ATSDR)]) where there is alleged a failure of the President or of such other officer to perform any act or duty . . . which is not discretionary with the President or such other officer. [FN43]

Venue for citizen suits lies in the appropriate district court where the violation occurred. [FN44] The court is authorized to order actions necessary to correct violations and to impose any civil penalties authorized for the violations. [FN45] Like the citizen suit provisions of other environmental statutes, section 310 contains provisions requiring notice as a precondition of bringing a citizen suit, [FN46] and citizen suits may not be brought if the government is "diligently prosecuting" an action to require cleanup of hazardous wastes. [FN47]

Section 310 was added in 1986 after considerable debate in Congress. As originally reported out of the House Energy and Commerce Committee, the citizen suit provision, contained in section 207 of House Resolution 2817, authorized actions against persons alleged to be in violation of the requirements of CERCLA and actions to compel the government to perform non-discretionary duties. [FN48] The House Judiciary Committee, however, amended section 207 by adding a new provision that would also have authorized citizen suits to abate an "imminent and substantial endangerment to health and the environment." [FN49]

As discussed more fully below, this amendment was intended to address weaknesses in the citizen suit provision of the Resource Conservation and Recovery Act (RCRA) that authorized citizen suits to compel the cleanup of hazardous or solid wastes that were threatening health and the environment. [FN50] The Committee also noted that the CERCLA amendment would *936 deal with inadequacies in state nuisance and trespass laws. [FN51]

The final bill, as reported out of the Conference Committee, contained several changes from the House and Senate citizen suit provisions. First, and perhaps most important, the Conference Committee deleted authorization for citizen suits for imminent and substantial endangerment. [FN52] The Conference Report also clarified that the President and other officers of the United States, including the Administrators of the EPA and the Agency for Toxic Substances and Disease Registry (ATSDR), are subject to citizen suits for failure to perform a nondiscretionary duty. [FN53] The final bill also precluded citizen suits in situations where the government was diligently prosecuting a court action under CERCLA or RCRA. [FN54] Finally, the conference substitute clarified House and Senate provisions by stating that section 310 does not affect or otherwise impair the rights of any person under federal, state, or common law except with respect to the timing provisions of section 113. [FN55]

II. SCOPE OF THE CITIZEN SUIT PROVISION

Section 310 authorizes suits against any person alleged to be in violation of a requirement of CERCLA or against the government for failure to perform any nondiscretionary duty. Notwithstanding this seemingly broad authority *937 to compel compliance with CERCLA, the citizen suit provision may in fact have only limited applicability. CERCLA has few self-implementing requirements; virtually no obligations arise in the absence of some prior government order. Thus, there may be few actions that can form the basis for a citizen suit under CERCLA.

A. Compelling Cleanup of Hazardous Substances

Prior to adoption of the CERCLA citizen suit provision, courts had held that private parties did not, under CERCLA, have the right to have a court compel the cleanup of hazardous substances. [FN56] One might expect that a citizen suit provision of CERCLA would at the very least authorize actions against potentially responsible parties to compel the cleanup of hazardous substances. One would, however, be wrong.

Section 310 only authorizes actions for violations of CERCLA requirements, and CERCLA simply does not prohibit the release of hazardous substances nor, in the absence of a government order, require their cleanup if released. [FN57] CERCLA certainly does provide authority to assure the cleanup of hazardous substances. Section 104 authorizes the government to clean a site and sue PRPs to recover the government's cleanup costs. [FN58] Section 106 gives the government broad authority to seek court orders or issue administrative orders compelling cleanup. [FN59] In the absence of some prior government action, however, CERCLA does not contain cleanup requirements that could form the basis of a citizen suit.

The legislative history of section 310 suggests that Congress did not intend section 310 to provide a direct action against PRPs to compel cleanup. In earlier House versions, section 310 expressly authorized citizen suits to abate an "imminent and substantial endangerment" to health or the environment. [FN60] This element of the CERCLA citizen suit was deleted in conference because the amendment, as described in the Conference Report, did not add to authority already contained in RCRA. [FN61]

Although section 7002 of RCRA does authorize citizen suits to compel the cleanup of hazardous wastes, its scope is narrower than that of CERCLA. *938 [FN62] CERCLA applies to the release of a hazardous "substance." [FN63] This term is defined to include large numbers of substances designated as

hazardous or toxic under a variety of federal environmental laws. [FN64] CERCLA is applicable regardless of whether these substances are wastes or products. [FN65] In contrast, section 7002 of RCRA applies only in the case of the release of a hazardous or solid "waste." [FN66] Determination of whether a material is a waste for purposes of RCRA can involve an extremely complicated assessment of both the type of material and the manner in which it is being handled. [FN67]

In most cases, this distinction should not matter. Hazardous substances subject to cleanup orders under CERCLA will also constitute hazardous "wastes" under RCRA. [FN68] Thus, the RCRA citizen suit provision should be available to compel the cleanup of hazardous materials spilled or otherwise released into the environment.

An action to abate a threatened release might, however, raise differences under CERCLA and RCRA. RCRA would not presumably authorize an action to abate problems caused by hazardous substances that are not classified as wastes but may still be released into the environment. For example, products stored in drums that are likely to leak would not necessarily be the subject of a RCRA citizen suit. It seems clear, however, that under CERCLA the government does have the authority to abate the threatened release of a hazardous substance in such circumstances. [FN69] Thus, the RCRA citizen suit provision does not provide the same scope of coverage that a properly drafted CERCLA citizen suit provision could provide.

***939** There is, however, another possible basis by which a citizen suit could be brought to compel the cleanup of a site. [FN70] Section 310 authorizes actions against the government to compel the performance of nondiscretionary duties. If exercise of the government cleanup authority under sections 104 and 106 were nondiscretionary, then citizens could sue to compel the government to undertake a cleanup action or issue orders to compel a cleanup.

It seems unlikely, however, that a court would find that the government has nondiscretionary duties to act under sections 104 or 106. Section 104 provides that the government "is authorized to act" in order to protect human health and the environment; [FN71] section 106 provides that the government "may" seek a court order or issue an administrative order. [FN72] Neither of these provisions speaks in terms of mandatory actions; neither provides that the government "shall" or "must" act. [FN73] Although courts have found nondiscretionary enforcement duties under other environmental statutes, differences in the language and structure of the other statutes suggest that courts would be unwilling to find a nondiscretionary duty under CERCLA. [FN74]

Only one court to date has considered whether section 310 authorizes an action to compel the government to take nondiscretionary enforcement action. In *Thompson v. Thomas* [FN75] the plaintiffs sought an order either to compel EPA to enforce the requirements of CERCLA against the landfill or to ***940** "fund a private cleanup of the site." [FN76] The plaintiff failed to cite section 310 in its complaint, and although apparently cited to the court, the plaintiff failed to provide notice as required by the section. The court, without analysis, stated that even if the notice requirement had been met, the plaintiff would still not have stated a cause of action. [FN77] The court noted that section 310 only authorized an action to compel performance of a nondiscretionary duty and found that plaintiff had stated no facts indicating that the EPA had a mandatory duty to plaintiff under section 310 of CERCLA. [FN78]

B. Adequacy of a Government Cleanup Order

Although CERCLA may not have a self-implementing requirement to clean up hazardous substances, CERCLA does have significant requirements for an adequate cleanup if undertaken by the government or private parties. Section 121 of CERCLA spells out very specific requirements that EPA must meet in selecting an appropriate remedy for cleanup of any given Superfund site. [FN79] Additionally, the National Contingency Plan promulgated by EPA specifies the steps that are necessary to develop and implement a removal or remedial action. [FN80]

These requirements are in many ways the heart of CERCLA. They define the final level of environmental quality that a cleanup must achieve and the cost that responsible parties will be forced to bear. [FN81] Thus, the availability of judicial review of government cleanup plans through citizen suits is a critically important issue to citizens, such as PRPs, who are concerned that the cleanup be as inexpensive as possible, and other citizens, such as neighbors of a site, who are concerned with the environmental adequacy of the cleanup plan.

Citizens under section 310 can challenge government compliance with the substantive and procedural requirements of CERCLA. [FN82] The legislative history of section 310 states that it was intended to provide a right to challenge the adequacy of a government cleanup action. [FN83] Additionally, at least one ***941** court has sustained a challenge under section 310 to a completed phase of a government cleanup plan. [FN84] Thus, section 310 does provide some substantive right of judicial review.

The significance of this right, however, is dependant on the timing of challenge to the government cleanup decisions. Citizens, even in the absence of section 310, would have the right to challenge final

government cleanup actions. PRPs can challenge the cleanup plan when the government sues them in a cost recovery action. [FN85] Other citizens may be able to challenge a cleanup simply as a violation of federal law. [FN86] Section 310 is meaningful only if it allows challenge to the adequacy of the cleanup plan prior to implementation of the plan. As discussed below, however, the judicial review provisions of CERCLA contain significant limits on the timing of challenges to government cleanup plans. [FN87] Thus, any judgment as to the substantive significance of section 310 requires resolution of the timing issues discussed in section three below.

C. Notification of the Release of a Hazardous Substance

Perhaps the only self-implementing requirement of CERCLA is the obligation to report the release of a hazardous substance. Section 103 of CERCLA requires "any person" in charge of a facility to notify the National Response Center in the event of a release of a reportable quantity of hazardous substances. [FN88] Thus, section 310 may authorize citizen suits for a violation ***942** of this requirement of CERCLA.

There is, however, a problem with the use of citizen suits to enforce the notification requirements of section 104. At least one court has held that citizen suits under section 310 may not be brought for "wholly past" violations of CERCLA. In *Lutz v. Chromatex*, [FN89] sixty-six plaintiffs, who were exposed to hazardous substances allegedly released into their groundwater by the defendants, filed complaints claiming a variety of violations under CERCLA, RCRA, and state common law. One count brought under the citizen suit provision of CERCLA alleged violations of the reporting requirements of section 103. The court, relying on *Gwaltney of Smithfield v. Chesapeake Bay Foundation*, [FN90] held that citizen suits under CERCLA could not be brought for wholly past violations. [FN91] Following the Supreme Court's analysis in *Gwaltney*, the court held that its conclusion was mandated by several factors. First, the "present tense" of section 310 authorizing citizen suits against persons alleged "to be in violation" of CERCLA implied that only current violations were subject to citizen suits. [FN92] Second, the notice requirement of the citizen suit implied that suits could only be brought for current violations since the purpose of notice is to give an alleged violator time to come into compliance. [FN93] Finally, the legislative history of CERCLA suggested that the purpose of the citizen suit provision was to aid in bringing violators into compliance and not to provide damages to plaintiffs. [FN94] Given *Gwaltney*, the court's analysis is arguably correct. [FN95]

If other courts impose a *Gwaltney* requirement on citizen suits under CERCLA, actions for violation of the notice provision of 103 will be substantially ***943** restricted. Nonetheless, even with a *Gwaltney* requirement, citizens may be able to bring citizen suits based on alleged failure to satisfy the reporting requirements of CERCLA. On-going and never reported releases of a reportable quantity of a hazardous substance may constitute continuous violations of CERCLA. Further, CERCLA imposes a limited obligation to report continuous releases of hazardous substances even after initially reported. [FN96] Thus, neighbors faced with continuing contamination from a site may be able to obtain a federal forum by alleging ongoing violations of the notice requirement. [FN97]

D. Preparation of a Risk Assessment by the ATSDR

One interesting aspect of CERCLA is the role of the Agency for Toxic Substances and Disease Registry (ATSDR) in the development of toxicological profiles of substances frequently found at Superfund sites and risk assessments of Superfund and other sites. [FN98] The ATSDR, located within the Public Health Service of the Department of Health and Human Services, was established by CERCLA in 1980. [FN99]

***944** Under section 104(i) of CERCLA, the ATSDR is required to prepare, under strict deadlines, a list of hazardous substances commonly found at Superfund sites and a toxicological profile of each listed substance. [FN100] The profile is to include an examination of all available toxicological and epidemiological information on the substance to identify levels of significant human health exposure to the substance. [FN101] Additionally, the profile must identify whether additional testing is needed to evaluate adequately the toxicity of a hazardous substance. [FN102] The statute requires the ATSDR to assure the initiation of a program of research to determine the health effects of substances for which adequate information is not available. [FN103]

Additionally, CERCLA requires the ATSDR to perform "health assessments" for each facility on the National Priorities List. [FN104] The statute also provides that the ATSDR may perform health assessments at facilities not on the NPL where individuals provide information that people have been exposed to a hazardous substance released into the environment from a facility. [FN105] These health assessments are to assess the potential risk to humans from the release of a hazardous substance and are based on such factors as the extent of contamination, the pathways of exposure, expected long and short-term effects, and recommended or tolerance limits of exposure. [FN106]

These provisions impose a variety of mandatory and discretionary duties on the ATSDR. Section 310 is certainly available to compel the Administrator of the ATSDR to perform nondiscretionary duties such as the listing of substances, development of guidelines, preparation of toxicological profiles, and health assessments at Superfund sites. Additionally, citizen suits may enable citizens to challenge the substantive adequacy of health assessments and the decisions to develop health assessments at non-Superfund sites to the extent that citizens can claim that the decisions violate the substantive requirements of CERCLA.

The availability of citizen suits to compel and review action by the ***945** ATSDR may be of considerable potential significance. First, the assessments are a significant component of remedial decisions made by EPA at a given site; thus, the ability to compel and review assessments may be important in supervising the cleanup decisions made by EPA. Second, the information supplied by ATSDR has the potential to be an important aspect of private tort actions brought by persons exposed to releases of hazardous substances. The toxicological information developed by the ATSDR is relevant to the difficult causation questions raised in toxic tort actions. [FN107] Thus, the CERCLA citizen suit provision may provide a vehicle for private plaintiffs to compel the government to prepare vital and expensive information necessary to prove successfully the elements of a tort claim.

III. THE TIMING OF REVIEW OF CITIZEN SUITS CHALLENGING GOVERNMENT CLEANUP DECISIONS

Perhaps the most crucial issue under section 310 is the ability of citizens to challenge the adequacy of government cleanup plans. Although section 310 does authorize such suits, [FN108] real questions exist as to whether citizens can bring the actions early enough to influence effectively the final decisions. This issue is now controlled by section 113(h), the "timing of review" provisions of CERCLA. [FN109] Under section 113(h)(4), courts do not have jurisdiction to review removal or remedial actions of the administrator or section 106 cleanup orders except for, among other things,

an action under section 9659 of this title (relating to citizen suits) alleging that the removal or remedial action taken under section 9604 of this title or secured under section 9606 of this title was in violation of any requirement of this chapter. Such an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site. [FN110]

This language limits the review of EPA decisions until after completion of some action.

Section 113(h) raises important issues. The provision was adopted in the 1986 SARA amendments and has its origins in earlier court decisions holding that PRPs could not delay implementation of cleanup actions by challenging the EPA's plan. [FN111] As discussed below, citizens other than PRPs may have a broader right to bring early challenges to the cleanup plan.

A. Applicability of Section 113(h) to Potentially Responsible Parties

CERCLA was Congress's response to the problem of the cleanup of hazardous substances in the environment, and its broad remedial objectives have ***946** led courts to conclude that its primary objective is the "prompt cleanup of hazardous waste sites." [FN112] Pre-enforcement review by responsible parties would act to delay implementation of the cleanup, [FN113] and, consistent with this concern, virtually every court that has considered the issue has concluded that CERCLA precludes pre-enforcement review of agency decisions by potentially responsible parties. [FN114] Congress recognized it was codifying existing case law through the adoption of section 113(h). [FN115]

Courts and Congress have recognized that limiting PRPs' rights of review until after a cleanup has been completed does not unduly prejudice their interests. [FN116] In virtually all cases, PRPs are concerned not with the environmental adequacy of a cleanup, but with the cost of cleanup that they will be required to bear. Post-cleanup review or review in enforcement actions, while not ideal from the PRPs' perspective, does provide a mechanism that responds to these concerns. Responsible parties can challenge the amount of money they must pay in a government cost recovery action by claiming that the cleanup plan did not comply with the requirements of CERCLA. [FN117] Parties also may be able to defend an action for violation of a section 106 order by alleging that the order did not comply with CERCLA requirements. [FN118] Thus, limitation of PRPs' rights of pre-enforcement review serve both the statutory objective of rapid and environmentally sound cleanups and the responsible parties' concern with limiting the expense of cleanup that they must pay.

B. Applicability of Section 113(h) to Other Citizens

Although limitation of pre-implementation review of cleanup plans by responsible parties serves to satisfy both the objectives of CERCLA and the PRPs, the same is not true of limiting pre-implementation review by citizens concerned with the environmental adequacy of the cleanup plans. PRPs can always

have their monetary liability reduced if the government plan is in ***947** error. Judicial review of the environmental adequacy of a plan after it has been completed, however, is of limited significance. At that point an effective remedy might require redoing a Superfund cleanup. Such a remedy, if not impossible, would likely result in an enormous expense. The only time in which review of a cleanup decision can sensibly take place is after the plan is developed but before it is implemented.

Although such challenges could delay the implementation of the final cleanup, they would help ensure that the cleanup is consistent with the objectives of CERCLA: that cleanups protect public health and the environment and provide, to the greatest extent possible, a permanent solution to the release of hazardous substances at a site. [FN119] There is substantial reason to think that the supervision provided by citizen suits is necessary to ensure proper cleanup of Superfund sites. For example, the federal Office of Technology Assessment has reported that EPA was inconsistently implementing the cleanup requirements added by SARA in 1986. [FN120] This inconsistency was especially true with respect to the requirement of section 121 that preference be given to permanent treatment of hazardous substances. [FN121] Additionally, Congress itself has recognized the need for proper supervision of EPA's cleanup decisions. Section 122(d) requires, in most cases, public comment and court approval of consent decrees between EPA and PRPs dealing with remedial actions. [FN122]

Resolving the issue of citizen challenges to government cleanup plans is difficult. The plain language, legislative history, and case law on this issue are all ultimately ambiguous. Nonetheless, as discussed below, it may be possible to resolve the problem of minimizing unnecessary delays in government cleanup actions while still providing citizens a meaningful opportunity to present legitimate challenges under section 310.

***948** 1. The Language of Section 310

The plain language of section 113(h)(4) does not suggest that environmentally concerned citizens are to be treated any differently from potentially responsible parties. That section simply provides that "an action" under section 310 challenging the adequacy of a cleanup plan or cleanup order cannot be brought until action is "taken" or "secured." [FN123] The past tense used for "taken" or "secured" indicates Congress's intention to limit review until after some action has been completed. [FN124] At least one court has relied on this "plain language" argument to find that citizens may not bring an action challenging a government cleanup plan. [FN125]

The plain language of section 113(h) does not itself resolve the issue of whether citizens may seek pre-implementation review of a cleanup plan. Section 113(h) limits review to actions that have been "taken" or "secured" and the question remains as to whether development of a final cleanup plan constitutes action "taken" for purposes of review by citizens concerned with the environmental adequacy of the decision. Some courts, noting the ambiguity of the provision, have concluded that the plain language of the statute does not resolve the issue. [FN126]

2. Legislative History

The issue of citizen groups' ability to undertake an early challenge to government cleanup decisions was the subject of considerable discussion in the legislative history. It seems clear that a challenge cannot be brought until some action has been taken or secured. [FN127] The Report of the House Judiciary ***949** Committee was explicit that citizens could not challenge the contents of a cleanup plan until after action had been taken, and the Report implies that this is not until after a plan has actually been implemented. [FN128]

This position, while sensible with respect to challenges by PRPs, would limit the effectiveness of challenges to the environmental adequacy of the cleanup plan. Some legislators, recognizing this problem, indicated that section 113 did not limit pre-implementation challenges to the environmental adequacy of a cleanup plan. Representative Roe, a member of the Conference Committee, stated that citizens could bring an action as soon as the agency announces its decision regarding the structure of a cleanup. [FN129] This position was supported by other legislators including Senator Stafford, also a member of the Conference Committee. [FN130] Furthermore, both Representative Roe and Senator Stafford indicated that courts should draw a distinction between actions by PRPs and "legitimate" citizen suits challenging illegal ***950** actions by the government. [FN131] Thus, many of the legislators directly involved in the adoption of section 310 stated that the preparation of a final cleanup plan constituted a final action subject to review by citizens challenging its environmental adequacy. [FN132]

Statements of other legislators, however, directly contradict the interpretation of Senator Stafford and Representative Roe. Representative Glickman, directly responding to Senator Stafford's remarks, stated that section 113(h) was intended to prevent neighbors, unhappy with a cleanup plan, to delay cleanup

through litigation. [FN133] Statements of other legislators also suggest that section 113 precludes any pre-implementation review of government cleanup plans. [FN134]

3. Case Law

Faced with ambiguous language and conflicting legislative history, courts have split over whether citizens, other than PRPs, can challenge the adequacy of a final cleanup plan. At least two courts have indicated that citizens' suits challenging the legality of government cleanup plans should receive different treatment from challenges by PRPs. In *Cabot Corp. v. E.P.A.* [FN135] several PRPs attempted to use the citizen suit provision of section 310 to enjoin the implementation of a government cleanup plan. The PRPs alleged, among other things, that the government had failed to limit cleanup costs as required by CERCLA and the NCP. Although the court held that section 113(h) barred pre-implementation challenges by PRPs concerned with monetary relief, the court suggested that early review might be available for citizen suits focusing on health and environmental concerns. [FN136] In **951 Artesian Water Co. v. Government of New Castle Co.* [FN137] the court also, in dictum, suggested that citizens claiming environmental harm could challenge the adequacy of the government's cleanup plan through use of the citizen suit provision of section 310. [FN138] The court, without analysis, stated that section 113(h)(4) provided an exception from the prohibition of judicial review for citizen suits. [FN139]

Two recent companion cases, however, hold that no pre-implementation review of cleanup plans is available to citizens challenging the legality of the government's decision. In *Schalk v. Thomas* [FN140] and *Frey v. Thomas* [FN141] the plaintiffs challenged the development of a consent decree that EPA and Westinghouse had entered into requiring Westinghouse to undertake a cleanup of PCB contamination. The plaintiffs, asserting jurisdiction under section 310, claimed that the government had failed to conduct an adequate Remedial Investigation/Feasibility Study (RI/FS), as required by CERCLA. The government moved to dismiss, claiming that the court did not have jurisdiction due to the timing provisions of section 113(h). After an extensive review of the legislative history, the court concluded that section 113 precludes a challenge of a government cleanup action until the action or a discrete phase of the action has been completed. [FN142] The court dismissed the court's statements in *Cabot*, referring to them as dictum and based on only a partial review of the legislative history. [FN143] Thus, since the plan had not yet been implemented, the court dismissed the suits as premature. [FN144]

In another recent case, *Neighborhood Toxic Cleanup Emergency v. Reilly*, [FN145] an association representing twenty-three residents living near a Superfund site sought an injunction to prevent the start of a scheduled government cleanup of the site. [FN146] The group challenged the adequacy of EPA's remedial plan, claiming that if the plan went forward without further study, it could pose a health hazard to residents living near the site. The group presented evidence that the health assessment performed by the ATSDR was inadequate and based on insufficient information.

***952** Looking to the legislative history, the court found that there was "some support" for the argument that "mere formulation" of the Record of Decision constituted "action taken" within the meaning of section 113(h)(4). [FN147] The court concluded, however, there was "more support" for holding that further action be taken before a citizen suit could proceed. [FN148] Significantly, the court found that the plaintiffs had an adequate opportunity to be heard because EPA had properly followed the notice and comment procedures required by section 117 of the Act. [FN149]

C. Resolving the Role of Citizen Suits in Challenges to Governmental Cleanup Plans

The availability of pre-implementation challenges by citizens raises interesting problems under CERCLA. Clearly, the existence of early judicial review could act to delay cleanup of hazardous substances. Citizens can raise challenges to hazardous waste cleanups for a variety of reasons, not all of which constitute legitimate challenges to the environmental adequacy of the cleanup. For example, the omnipresent NIMBY ("Not in My Back Yard") syndrome raises concerns that citizens may seek to block remedial plans that call for transportation of wastes to sites near them. [FN150] Nonetheless, experience with EPA suggests that the only effective constraint on government decisionmaking is the availability of judicial review. Examples of EPA's process of developing cleanup plans confirms this. [FN151] Thus, the challenge of interpreting the role of pre-implementation citizen challenges to EPA cleanup plans lies in resolving the conflicting objectives of ensuring proper cleanup plans by the government while not unduly delaying the cleanup of hazardous waste sites.

This challenge is not insurmountable. Although much of the language, legislative history, and case law is ambiguous, some things are clear. Congress, in section 310, has indicated its intention to provide a role for citizen "attorney general" actions under CERCLA. Interpretations of the statute that restrict challenges of government cleanup plans until after implementation of the plan essentially eliminate any effective

citizen role in the CERCLA cleanup process. In light of the ambiguity of the language and legislative history, such a construction should be avoided. Second, Congress, in section 113(h), has indicated that it wishes to avoid unnecessary delay of cleanups. [FN152] Third, distinctions between citizen suits by responsible parties and other citizens are warranted. [FN153] PRPs can satisfy their concerns with being held responsible for unnecessary costs of cleanups through post-*953 cleanup challenges. Citizens challenges to the environmental adequacy of cleanups cannot effectively be satisfied by post-cleanup litigation. The statute, however, can be interpreted to respond to all of these factors.

1. Limit Citizen Suits to Challenges for Failure to Perform Nondiscretionary Duties

Section 310 authorizes citizen suits both to litigate whether a cleanup plan adequately satisfies statutory requirements and to review the government's failure to perform a nondiscretionary duty. Challenges to the adequacy of a cleanup plan essentially involve claims that the government has improperly exercised its discretionary authority under the statute. Given the concern with preventing delays in the cleanup of hazardous waste sites, it is arguable that neither PRPs nor citizens should be able to challenge government discretionary actions until after some stage of the cleanup is completed. In such cases, the government has made its decision, however questionable, after following appropriate procedures and considering relevant criteria.

Challenges for failure to perform nondiscretionary duties, however, raise other concerns. These challenges involve claims that the government has not complied with mandatory requirements when making its decision. The most important example of a challenge to a cleanup plan based on failure to perform a nondiscretionary duty would involve a claim that the government has failed to comply with statutory and regulatory requirements to ensure proper public participation in the government decisionmaking process. [FN154] In such a case, courts should not defer to the government decision by restricting citizen suits to the post-implementation stage.

The legislative history supports this distinction. Representative Glickman and others who argued for delaying citizen suits did so in part based on the fact that the statute mitigates the need for pre-implementation citizen suits through the statutory and regulatory requirements that EPA provide for public participation in cleanup plan development and that EPA adequately documents its final decision. [FN155] This rationale fails, however, when EPA neglects to implement properly the public participation requirement and denies citizens a fair opportunity to provide meaningful comment on the proposed plan. [FN156]

*954 If no pre-implementation review were allowed, EPA could engage in a perfunctory "notice and comment" procedure, and then proceed down whichever road it chose without fear of judicial scrutiny until the remedy was complete. [FN157] The citizens would then be in a difficult, if not impossible, position of asking a court to order EPA to redo the entire cleanup.

Limiting citizen suits to challenges to violations of nondiscretionary duties would delay only those cleanups where the government's decision has lost its claim to legitimacy by failing to comply with express statutory procedural and substantive requirements. Citizen challenges to the exercise of government discretion would wait until after the completion of a stage of cleanup. This seems to reflect the deal that many in Congress opposing pre-implementation citizen suits believe was struck in sections 310 and 113(h).

2. Standards for the Issuance of Preliminary Injunctions Prevent Unnecessary Delays in Implementation of Government Cleanup Plans

If citizens are allowed to bring challenges to either discretionary or nondiscretionary government decisions, the courts have ample authority to prevent unnecessary delays in implementation of hazardous waste cleanups. Courts can simply refuse to issue an injunction halting the cleanup work and let EPA proceed at its own risk with the cleanup. In order to obtain a preliminary injunction, citizen plaintiffs would need to satisfy traditional equitable principles for the grant of injunctive relief. [FN158] Thus, they would have to demonstrate, among other things, that they were "likely to prevail on the merits" and that they would be "irreparably harmed" by failure to enjoin the government's action. [FN159] These traditional tests should assure that any meritless challenges to a cleanup plan do not unduly delay the cleanup work. If plaintiffs demonstrate that they are entitled to a preliminary injunction on the grounds that the proposed cleanup does not meet the requirements of CERCLA, then the government should not be proceeding with the cleanup. No objective is served by allowing the government to proceed with a cleanup in such a case.

*955 IV. CONCLUSION

The citizen suit provision of CERCLA may be largely devoid of substance. In only a few situations can citizens effectively compel or challenge actions involving the cleanup of hazardous substances under CERCLA. Although the provisions of other statutes and other provisions of CERCLA in part remedy this failure, the citizen suit provision itself remains a largely empty token to the role of citizens in enforcing environmental policy.

Citizen suits under CERCLA need not, however, be completely devoid of content. Congress contemplated that citizens would have a role in supervising the adequacy of government cleanup decisions. The ambiguity in the language and legislative history of section 310 requires courts to interpret the statute in a manner that satisfies the clear congressional objectives of both providing an effective role for citizen suits and minimizing unnecessary delays in cleanup. It remains to be seen how courts will balance these competing objectives. Through limitation of citizen suits to challenges of nondiscretionary duties and through use of their equitable authority to deny preliminary injunctions, courts can successfully balance these objectives. The significance of the citizen suit provision of CERCLA, and in some respects, the adequacy of future cleanup plans depends on the resolution of this issue.

[FN^a] B.A., University of California, Santa Barbara; J.D., Columbia University; M.P.H., Harvard University. Associate Professor, Southern Methodist University School of Law. Of Counsel, Gardere & Wynne, Dallas, Texas. Attorney, Office of General Counsel, U.S. Environmental Protection Agency, 1977-1981.

Professor Gaba would like to thank Dr. and Mrs. Arthur Sarris for their generous financial support in connection with preparation of this Article.

[FN^{aa}] B.S. Chem. Eng., University of Arizona; J.D., University of Texas. Partner, Henry and Kelly, Austin, Texas.

[FN¹]. Section 16 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. § 411 (1988), authorized courts to award up to one-half of any fine to be paid to the person giving information leading to the conviction. See Rodgers, Industrial Water Pollution and the Refuse Act: A Second Chance for Water Quality, 119 U.P.A.L.REV. 761 (1971); Comment, Informer Fees Under the Refuse Act: Deciding Who Gets What, 5 ENVTL.L. 321 (1975).

[FN²]. 5 U.S.C. §§ 552-559 (1988). Indeed, environmental litigation helped shape the modern rules relating to standing and judicial review. See, e.g., Sierra Club v. Morton, 405 U.S. 727, 730 (1972) (plaintiffs lacked standing to sue because they did not demonstrate that they would be among the class of citizens injured by a proposed act); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410-11 (1971) (plaintiffs entitled to judicial review of Department of Transportation decision because there was no congressional intent to the contrary in the relevant statutes); Scenic Hudson Preservation Conference v. F.P.C., 354 F.2d 608 (2d Cir.1965), cert. denied, 384 U.S. 941 (1966) (plaintiffs were "aggrieved" party under relevant statute thus entitled to judicial review).

[FN³]. See infra note 5.

[FN⁴]. The Report of the House Public Works and Transportation Committee, addressing the need for a citizen suit provision in CERCLA, stated:

CERCLA is one of only two Federal environmental laws which does not contain a citizens suit provision. The other is the Federal Insecticide, Fungicide and Rodenticide Act. Citizens suits provisions have been found to be helpful both in encouraging diligent Federal enforcement of environmental statutes and in locating and taking actions against violators of these Acts.

H.R.Rep. No. 253(V), 99th Cong., 2d Sess. 83, reprinted in 1986 U.S.Code Cong. & Admin.News 3206.

[FN⁵]. See Toxic Substances Control Act § 207, 15 U.S.C. § 2647 (1988); Endangered Species Act § 1540(g), 16 U.S.C. § 1540(g) (1988); Surface Mining Control and Reclamation Act § 520, 30 U.S.C. § 1270 (1988); Clean Water Act § 505, 33 U.S.C. § 1365 (1988); Marine Protection, Research, and Sanctuaries Act § 105(g), 33 U.S.C. § 1415(g) (1988); Deep Water Port Act § 16, 33 U.S.C. § 1515 (1988); Safe Drinking Water Act § 1449, 42 U.S.C. § 300j-8 (1988); Noise Control Act § 12, 42 U.S.C. § 4911 (1988); Resource Conservation and Recovery Act § 7002, 42 U.S.C. § 6972 (1988); Clean Air Act § 304, 42 U.S.C. § 7604 (1988); Outer Continental Shelf Lands Act § 23, 43 U.S.C. § 1349 (1988).

[FN⁶]. Pub.L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601-9675 (1988)).

[FN7]. CERCLA defines the requirements for the cleanup of hazardous substances that have been released into the environment. *Id.*; see *infra* notes 33-35 and accompanying text. The Resource Conservation and Recovery Act (RCRA) defines the requirements for the disposal of hazardous wastes. 42 U.S.C. §§ 6901-6992k (1988). RCRA establishes requirements for the generators, transporters, and facilities that treat, store, or dispose of those wastes and, among other things, requires the disposal of such wastes in facilities that have received RCRA permits. See generally ENVTL.L.INST., THE LAW OF ENVIRONMENTAL PROTECTION ch. 13 (S. Novick, D. Stever & M. Mellon eds.1989) (comprehensive discussion of regulations) [hereinafter PROTECTION]. CERCLA and RCRA interrelate in a complex manner. For example, RCRA establishes requirements similar to CERCLA for the cleanup of inactive hazardous waste sites, 42 U.S.C. § 6924(v) (1988), and CERCLA uses some RCRA standards to define the required level of cleanup of hazardous substances, *id.* § 9621(d).

[FN8]. See generally J. MOSKOWITZ, ENVIRONMENTAL LIABILITY AND REAL PROPERTY TRANSACTIONS (1989) (comprehensive review of environmental liability arising from real property transactions); Marcotte, Toxic Blackacre: Unprecedented Liability for Landowners, 73 A.B.A.J. 67 (Nov.1987) (comprehensive discussion of landowners' environmental liability).

[FN9]. See *infra* notes 23-42 and accompanying text.

[FN10]. See J. ARBUCKLE, ENVIRONMENTAL LAW HANDBOOK 115 (9th ed.1987) (costs of cleanup of individual sites on the National Priorities List (NPL) may rise from \$9 million dollars per site to \$30-\$50 million dollars per site since adoption of SARA); D. HAYES & C. MACKERRON, SUPERFUND II: A NEW MANDATE (A BNA Special Report) 13 (Feb. 13, 1987) (costs of \$11.8 to \$22.7 billion dollars for the cleanup of 1,500 to 2,500 hazardous waste sites) [hereinafter SUPERFUND II].

[FN11]. Superfund Amendments and Reauthorization Act § 206, Pub.L. No. 99-499, 100 Stat. 1613, 1703 (codified as amended at 42 U.S.C. § 9659 (1988)).

[FN12]. See generally Miller, Private Enforcement of Federal Pollution Control Laws, 13 Env'tl.L.Rep. (Env'tl.L.Inst.) 10,309 (1983) (discussing history of citizens suits under environmental statutes and impact of private enforcement on environmental law). One report concerning the extent of citizen suits evaluated over 1200 citizen suits brought under the Clean Air, Clean Water, and Resource Conservation Acts. See L. JORGENSEN & J. KIMMEL, ENVIRONMENTAL CITIZEN SUITS: CONFRONTING THE CORPORATION (A BNA Special Report) 18 (1988) [hereinafter CITIZEN SUITS]. In the early 1980s, private environmental groups implemented a coordinated campaign to file citizen suits under the Clean Water Act. See Guida, Dramatic Growth in Citizen Suits Under the Federal Clean Water Act, NAT'L L.J., Dec. 3, 1984, at 24.

[FN13]. See *infra* notes 57-61 and accompanying text.

[FN14]. See *infra* notes 29-32 and accompanying text.

[FN15]. See *infra* notes 129-159 and accompanying text.

[FN16]. See *infra* notes 112-118 and accompanying text.

[FN17]. See *infra* notes 119-159 and accompanying text.

[FN18]. For a review of the limited and confusing legislative history of CERCLA, see 1 ENVTL.L.INST., SUPERFUND: A LEGISLATIVE HISTORY xiii-xxii (1982); Eckhardt, The Unfinished Business of Hazardous Waste Control, 33 BAYLOR L.REV. 253 (1981); Grad, A Legislative History of the Comprehensive Environmental Response, Compensation, and Liability ("Superfund") Act of 1980, 8 COLUM.J.ENVTL.L. 1 (1982).

[FN19]. For a general review of CERCLA, see J. ARBUCKLE, *supra* note 10; J. CASLER & S. RAMSEY, SUPERFUND HANDBOOK (1985); W. FRANK & T. ATKESON, SUPERFUND: LITIGATION AND CLEANUP (A BNA Special Report) (1985); PROTECTION, *supra* note 7; Comment, CERCLA Litigation Update: The Emerging Law of Generator Liability, 14 Env'tl.L.Rep. (Env'tl.L.Inst.) 10,224 (1984). For a summary of the changes made by the Superfund Amendment and Reauthorization Act (SARA), see D. HAYES & C. MACKERRON, *supra* note 10.

[FN20]. The Administrator of the EPA has been delegated the President's authority to implement CERCLA. See Exec. Order No. 12,580, 3 C.F.R. 193 (1987) (superseding Exec. Order No. 12,316, 3 C.F.R. 168 (1981)).

[FN21]. 42 U.S.C. § 9604 (1988).

[FN22]. The Hazardous Substance Superfund is established under 26 U.S.C. ch. 98A. Appropriation and uses of the fund are specified in § 9611 of CERCLA, 42 U.S.C. § 9611 (1988). For a general discussion of the Superfund tax mechanisms, see Carlson & Bausell, *Financing Superfund: An Evaluation of Alternative Tax Mechanisms*, 27 NAT. RESOURCES J. 103 (1987).

[FN23]. 42 U.S.C. § 9607(a) (1988). The class of parties liable as "owners or operators" has been held to extend to, among others, current owners, lessees and sublessors, successor corporations, and parent corporations. See New York v. Shore Realty Corp., 759 F.2d 1032, 1043 (2d Cir.1985) (current owners); United States v. South Carolina Recycling & Disposal, 21 Env't Rep.Cas. (BNA) 1577, 1581 (D.S.C.1984) (lessees and sublessors); United States v. Vertac Chem. Corp., 489 F.Supp. 870, 888 (E.D.Ark.1980) (successor corporations); Note, Liability of Parent Corporations for Hazardous Waste Cleanup and Damages, 99 HARV.L.REV. 986, 990-95 (1986) (discussing liability of parent corporations). Past owners are liable if they owned the facility at the time of disposal, 42 U.S.C. § 9607(a)(2) (1988), or if they knew of the presence of hazardous substances and sold the facility without disclosing this information, see id. § 9601(35)(C). Transporters are in general liable only if they selected the site to which the substances were transported. Id. § 9607(a)(3). Generators are liable if they "arranged for disposal" of the substances. Id. § 9607(a)(4); see Baskin & Reed, "Arranging for Disposal" Under CERCLA: When Is a Generator Liable?, 15 Env'tl.L.Rep. (Env'tl.L.Inst.) 10,160 (1985).

[FN24]. See New York v. Shore Realty Corp., 759 F.2d 1032, 1042 (2d Cir.1985); United States v. Northeastern Pharmaceutical & Chem. Co., 579 F.Supp. 823, 844 (W.D.Mo.1984); Comment, *supra* note 19, at 10,225.

[FN25]. See, e.g., Northeastern Pharmaceutical, 579 F.Supp. at 844-45 (joint and several liability found upon facts of case); United States v. A & F Materials Co., 578 F.Supp. 1249, 1254-55 (S.D.Ill.1984) (legislative history and statutory language supports joint and several liability); United States v. Wade, 577 F.Supp. 1326, 1338-39 (E.D.Pa.1983) (congressional intent mandates joint and several liability). See generally Note, *Joint and Several Liability for Hazardous Waste Releases Under Superfund*, 68 VA.L.REV. 1157 (1982) (statutory analysis of joint and several liability).

[FN26]. Section 105 of CERCLA requires EPA to promulgate revisions to the NCP in order to establish "procedures and standards for responding to releases of hazardous substances, pollutants and contaminants." 42 U.S.C. § 9605(a) (1988). The portions of the NCP dealing with the requirements of CERCLA are codified at 40 C.F.R. §§ 300.61-.71 (1988).

Section 107 authorizes EPA to recover only those costs incurred that are "not inconsistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(B).

[FN27]. The NPL is published separately from the NCP at 40 C.F.R. § 300 app. B (1988). See 42 U.S.C. § 9605(a)(8)(B) (1988). As of October 26, 1989, there were 1219 proposed and final sites on the NPL. 54 Fed.Reg. 43,778 (1989).

[FN28]. The NCP expressly provides that "[f]und-financed remedial action, excluding remedial planning activities pursuant to CERCLA section 104(b), may be taken only at sites listed on the NPL." 40 C.F.R. § 300.68(a)(1) (1988). EPA is also authorized to undertake "removal" actions, which are relatively short-term cleanup actions designed to deal with immediate threats to human health and the environment. 42 U.S.C. § 9601(23) (1988). CERCLA provides that removal actions may not, in most cases, cost more than two million dollars or last more than twelve months. Id. § 9604(c)(1). The NCP establishes limited circumstances in which the money and time limitations may be exceeded. 40 C.F.R. § 300.65(a)(3) (1988).

[FN29]. 42 U.S.C. § 9606(a) (1988).

[FN30]. Id. § 9606(b)(1).

[FN31]. Id. § 9607(c)(3).

[FN32]. See infra notes 112-118 and accompanying text.

[FN33]. 42 U.S.C. § 9621(d) (1988).

[FN34]. Id.

[FN35]. Id. § 9621(b).

[FN36]. See generally PROTECTION, supra note 7, at 13-149 to 151 (discussing public participation requirements of CERCLA).

[FN37]. 42 U.S.C. § 9617(a)(1)-(2) (1988).

[FN38]. Id. § 9617(a)(2).

[FN39]. Id. § 9617(e).

[FN40]. See ARBUCKLE, supra note 10, at 111-12.

[FN41]. Id. § 9607(a)(4)(B). For a general discussion of the private right of action under CERCLA, see Gaba, Recovering Hazardous Waste Cleanup Costs: The Private Cause of Action Under CERCLA, 13 ECOLOGICAL L.Q. 181 (1986).

[FN42]. See 42 U.S.C. § 9613(f) (1988) (provision authorizing action for contribution among PRPs); Gaba, supra note 41, at 227-30.

[FN43]. 42 U.S.C. § 9659(a) (1988).

[FN44]. Id. § 9659(b).

[FN45]. Id. § 9659(c).

[FN46]. Id. § 9659(d)(1). The notification provisions require that the citizen plaintiff provide notice to the President, the state in which the alleged violation occurs, and to the alleged violator 60 days before the commencement of the suit. Id. Comparable notice provisions in other statutes have been found to be jurisdictional prerequisites. See, e.g., Hallstrom v. Tillamook, 26 Env't Rep. Cas. (BNA) 1809 (9th Cir. 1987) (60-day notice requirement of RCRA is jurisdictional); Walls v. Waste Resource Corp., 761 F.2d 311 (6th Cir. 1985) (RCRA, CERCLA, and Federal Water Pollution Control Act notice provisions are jurisdictional). Additionally, the Supreme Court in part relied on the requirement of providing 60 days notice to alleged violators for its conclusion in Gwaltney of Smithfield Ltd. v. Chesapeake Bay Foundation, Inc., 484 U.S. 49, 50 (1987), that citizens could not bring actions for "wholly past" violations of the Clean Water Act. The significance of Gwaltney to citizen suits under CERCLA is discussed infra notes 90-97 and accompanying text.

[FN47]. 42 U.S.C. § 9659(d)(2) (1988).

[FN48]. See H.R. Rep. No. 99-253(I), 99th Cong., 2d Sess. 107, reprinted in 1986 U.S. Code Cong. & Admin. News 2853, 2889.

[FN49]. See H.R. Rep. No. 99-253(III), 99th Cong., 2d Sess. 34, reprinted in 1986 U.S. Code Cong. & Admin. News 3038, 3057. Additionally, the Judiciary Committee provision authorized intervention in citizen suits by persons, such as neighbors of a site, affected by a citizen suit. Id.

[FN50]. Under RCRA, citizens may sue to abate an imminent and substantial endangerment resulting from the release of a "hazardous waste." 42 U.S.C. § 6972 (1988). CERCLA, however, deals more broadly with

the release of hazardous "substances," and the Judiciary Committee was concerned that the citizen suit provisions of RCRA did not deal with all of these releases. The Report of the Judiciary Committee stated that:

One of the main reasons the Committee added this provision to CERCLA is because it is unclear whether citizens can use the citizen suits provision currently contained in RCRA . . . to address all waste site threats. . . . With this amendment, plaintiffs and the courts will not have to waste time and resources in determining that a non-listed substance is a solid waste under RCRA. Citizens should be able to protect themselves from dangerous chemicals regardless of whether EPA has formally listed the chemical under RCRA.

H.R.Rep. No. 99-253(III), 99th Cong., 2d Sess. 34, reprinted in 1986 U.S.Code Cong. & Admin.News 3038, 3057. For a discussion of the relationship between the CERCLA and RCRA citizen suit provisions, see *infra* notes 60-69 and accompanying text.

[FN51]. H.R.Rep. No. 99-253(III), 99th Cong., 2d Sess. 34, reprinted in 1986 U.S.Code Cong. Admin.News 3038, 3057.

[FN52]. The Conference Report stated:

Under the citizens suit provision of the Solid Waste Disposal Act [also known as the Resource Conservation and Recovery Act or RCRA], any person is authorized to seek relief, including abatement, where the past or present handling, storage, treatment, transportation or disposal of any solid or hazardous waste may present an imminent and substantial endangerment to health or the environment. The section being deleted from this citizens suits provision covered "a hazardous waste disposal site," and thus, its operative effect would have been to cover only locations already covered under the comparable citizens suits provision of the Solid Waste Disposal Act. In fact, the Solid Waste Disposal Act provision applies to a broader range of locations since it applies not only to hazardous waste disposal sites, but also to sites where solid waste disposal may present an imminent and substantial endangerment. Thus, because the Solid Waste Disposal Act provision applies to localities where disposal of solid or hazardous waste as well as hazardous substances has occurred, this overlapping provision was unnecessary.

H.R.Conf.Rep. No. 99-962, 99th Cong., 2d Sess. 273-74; reprinted in 1986 U.S.Code Cong. & Admin.News 3276, 3366-67. For a discussion of the differences in scope between the CERCLA and RCRA citizen suit provisions, see *infra* notes 60-69 and accompanying text.

[FN53]. See H.R.Conf.Rep. No. 99-962 at 274, 1986 U.S.Code Cong. & Admin.News at 3366-67.

[FN54]. *Id.* The House amendment, which applied this bar when the government had commenced and was diligently pursuing an administrative order, was deleted. *Id.*

[FN55]. *Id.*

[FN56]. See New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir.1985); United States v. Conservation Chem. Co., 619 F.Supp. 162 (D.C.Mo.1985).

[FN57]. The Report of the House Public Works and Transportation Committee, discussing the need for authority for citizens to abate imminent and substantial endangerments, noted that:

CERCLA, however, contains no general prohibition against the release of hazardous substances. In order to obtain the same legal remedies which are available under the Federal Water Pollution Control Act [which prohibits the discharge of pollutants into navigable waters without a permit], it is necessary to add the third element which allows a citizen to bring an action to abate a release or threatened release of a hazardous pollutant which is presenting an imminent and substantial endangerment to the public health or the environment.

H.R.Rep. No. 99-253(V), 99th Cong., 2d Sess. 83, reprinted in 1986 U.S.Code Cong. & Admin.News 3124, 3206.

[FN58]. See *supra* notes 21-28 and accompanying text.

[FN59]. See *supra* notes 29-32 and accompanying text.

[FN60]. See *supra* notes 49-51 and accompanying text.

[FN61]. See *supra* note 52 and accompanying text.

[FN62]. Section 7002 authorizes actions against:

any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage or disposal facility; who has contributed or who is contributing to the past or present handling, storage, treatment, transportation; or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment.

42 U.S.C. § 6972 (1988). This section has been used as the basis for actions to compel the cleanup of hazardous wastes. See *CITIZEN SUITS*, *supra* note 12, at 2.

[FN63]. Sections 104 and 106 authorize the action with respect to hazardous substances. 42 U.S.C. §§ 9604(a)(1), 9606(a) (1988).

[FN64]. Section 101(14) defines "hazardous substance" to include materials designated as hazardous under a variety of other environmental statutes or designated as hazardous under § 102 of CERCLA. *Id.* §§ 9601(14), 9602(a). Additionally, § 104 of CERCLA authorizes the government to undertake a cleanup action where there has been a release or substantial threat of release of "pollutants or contaminants" that may present an imminent and substantial danger to health or the environment. *Id.* § 9604(a)(1).

[FN65]. See *Eagle-Picher Indus. v. EPA.*, 759 F.2d 922, 927-32 (D.C.Cir.1985).

[FN66]. 42 U.S.C. § 6972(a) (1988).

[FN67]. See Gaba, *Solid Waste and Recycled Materials Under RCRA: Separating Chaff from Wheat*, 16 *ECOLOGY L.Q.* 623, 634-40 (1989).

[FN68]. For example, secondary materials that are recycled by burning for energy recovery or applied to the land are classified as solid wastes. 40 C.F.R. § 261.2 (1988). See Gaba, *supra* note 67, at 636-40. In some situations, however, hazardous substances that are released into the environment would not be classified as wastes. Pesticides are a troubling example. See Grumbles, *Pesticides in Groundwater and Section 106 of CERCLA*, 19 *Env't Rep. [Current Developments]* (BNA) 281 (June 24, 1988).

[FN69]. CERCLA § 106 orders may be issued "because of an actual or threatened release of a hazardous substance from a facility." 42 U.S.C. § 9606(a) (1988).

[FN70]. Some citizens also have another avenue under CERCLA to ensure the cleanup of a hazardous waste site. The private cost-recovery action contained in § 107(a)(4)(B) authorizes citizens to clean up a site themselves and then sue PRPs for reimbursement. *Id.* § 9607(a)(4)(B). This provision, although important, is not a substitute for an action to compel the cleanup of a site. To bring a private cost recovery action, citizens must first have "incurred" costs of cleanup and face significant uncertainty as to whether they will be able to recover their expenses. *Id.*; see Gaba, *supra* note 41, at 224-31. This provision limits the availability of the remedy to very few of the citizens potentially affected by the release of a hazardous substance.

[FN71]. 42 U.S.C. § 9604(a)(1) (1988).

[FN72]. *Id.* § 9606(a).

[FN73]. Statutory language that an act "shall" be carried out is generally considered to be mandatory. See *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947); *Escue v. Zerbst*, 295 U.S. 490, 493 (1935).

[FN74]. Several courts have found that EPA has a nondiscretionary duty to issue Notices of Violation or Administrative Orders under the Clean Air and Clean Water Acts. See, e.g., *DuBois v. EPA*, 646 F.Supp. 741 (W.D.Mo.1986) (Clean Water Act); *Greene v. Costle*, 577 F.Supp. 1225 (W.D.Tenn.1983) (Clean Water Act); *Illinois v. Hoffman*, 425 F.Supp. 71 (S.D.Ill.1977) (Clean Water Act). Many courts have held, however, that the final enforcement decision is wholly discretionary. See, e.g., *Sierra Club v. Train*, 557 F.2d 485 (5th Cir.1977) (Clean Water Act); *Caldwell v. Gurley Ref. Co.*, 533 F.Supp. 252 (E.D.Ark.1982) (Clean Air Act). By contrast, other courts have held that both the decision to find a violation and the decision to undertake civil enforcement actions are discretionary and thus not subject to review under

citizens suit provisions. See, e.g., South Carolina Wildlife Fed'n v. Alexander, 457 F.Supp. 118 (D.S.C. 1978) (Clean Water Act); Wisconsin Env'tl. Decade v. Wisconsin Power & Light, 395 F.Supp. 313 (W.D.Wis.1975) (Clean Air Act). All of these conclusions were largely premised on the specific language of the statutes that alternately spoke of actions that the Administrator "shall" or "may" take. In the absence of some mandatory language, it is unlikely that courts would have found a nondiscretionary duty to undertake enforcement actions.

[FN75]. 680 F.Supp. 1 (D.D.C.1987).

[FN76]. Id. at 3.

[FN77]. Id.

[FN78]. Id.

[FN79]. See supra notes 33-42 and accompanying text.

[FN80]. See supra notes 36-40 and accompanying text.

[FN81]. See Comment, Superfund and the National Contingency Plan: How Dirty is "Dirty"? How Clean is "Clean"?, 12 ECOLOGY L.Q. 89 (1984).

[FN82]. Citizens may also have the opportunity to contest the adequacy of a government cleanup plan in the context of a court's review of a consent decree between EPA and PRPs. See infra note 122 and accompanying text.

[FN83]. See, e.g., H.R. Conf. Rep. No. 99-962, 99th Cong., 2d Sess. 224, reprinted in 1986 U.S. Code Cong. & Admin. News 3276, 3317 (Report of the House Conference Committee describing the stage at which an action under § 310 could be brought to challenge the adequacy of a cleanup under CERCLA); H.R. Rep. No. 99-253(III), 99th Cong., 2d Sess. 23, reprinted in 1986 U.S. Code Cong. & Admin. News 3038, 3046 (Report of the House Judiciary Committee discussing the timing of challenges to cleanup actions under § 310).

Senator Stafford, a member of the Conference Committee, commented on the role of citizen suits in ensuring implementation of CERCLA cleanup standards:

A major goal of [SARA] is to establish specific, uniform national health standards that will apply to cleanup decisions at Superfund sites The standards contained in the bill establish a series of non-discretionary, minimum requirements which all Superfund responses must meet in order to assure the protection of human health and the environment. While the conferees fully expect officials of the Environmental Protection Agency and others to adhere to these standards, past experience has demonstrated that enforcement of such legal requirements by affected citizens' groups--acting as private attorneys general--is an essential component in the implementation of any such detailed statutory mandate. For this reason, section 206 of the bill establishes [sic] an independent citizens' suit provision under any [sic] section 310 of the act.

132 CONG. REC. S14898 (daily ed. Oct. 3, 1986).

[FN84]. See United States v. Rohm & Haas Co., 669 F.Supp. 672, 681 (D.N.J.1987).

[FN85]. Parties are liable only for government expenses that are "not inconsistent" with the NCP. 42 U.S.C. § 9607(a)(4)(A) (1988). As the court noted in Lone Pine Steering Comm. v. EPA, 777 F.2d 882, 887 (3d Cir.1985), "[s]ection 9607 provides an adequate opportunity for the alleged responsible parties to object to the cost and adequacy of response actions."

[FN86]. The requirements of a cleanup are defined by statute and regulation, see supra notes 33-40 and accompanying text, and presumably violations of these requirements would give rise to jurisdiction as a "federal question." Pub.L. No. 96-486, § 2(A), 94 Stat. 2369 (codified as amended at 28 U.S.C. § 1331 (1988)). Process of judicial review would be governed by the Administrative Procedure Act, Pub.L. No. 94-574, 1 Stat. 2728 (codified as amended at 5 U.S.C. § 702 (1988)). This Act has been the basis for raising challenges to government actions under the environmental laws for which there are no specific provisions for citizen suits or judicial review. See, e.g., Orleans Audubon Soc'y v. Lee, 742 F.2d 901 (5th Cir.1984).

(review under Administrative Procedure Act of alleged violations of Federal Insecticide, Fungicide, and Rodenticide Act); Oregon Envtl. Council v. Kunzman, 714 F.2d 901 (9th Cir.1983) (alleged violations of River and Harbour Appropriations Act reviewed under Administrative Procedure Act).

[FN87]. See infra notes 108-159 and accompanying text.

[FN88]. 42 U.S.C. § 9603(a) (1988). Under EPA regulations owners or operators are required to notify the National Response Center if they have knowledge of the release of a "reportable quantity" of a hazardous substance within a twenty-four-hour period. 40 C.F.R. § 302.6 (1988). EPA has promulgated reportable quantities for 721 hazardous substances. Id. § 302.2. In the absence of a promulgated reportable quantity, CERCLA provides that the reportable quantity shall be one pound. 42 U.S.C. § 9602(b) (1988). Reporting is only required under § 103(a), however, when the owner or operator has "knowledge" of the release of a reportable quantity. Id. § 9603(a). It is unclear, however, what level of knowledge is required to trigger this reporting requirement.

[FN89]. 718 F.Supp. 413 (M.D.Pa.1989).

[FN90]. 484 U.S. 49 (1987).

[FN91]. Lutz, 718 F.Supp. at 420-22.

[FN92]. Id. at 421.

[FN93]. Id.

[FN94]. Id. at 421-22.

[FN95]. There are, however, problems with the court's analysis. First, the opinion is premised on the view that the purpose of the notice provision is to give violators time to come into compliance. Id. There is, however, some indication that Congress did not intend to give violators of hazardous waste requirements an opportunity to correct their violations before they could be sued. In the 1980 amendments to RCRA, which were never mentioned by the Supreme Court, Congress amended RCRA to clarify that government enforcement actions could be brought without first issuing a compliance order. 42 U.S.C. § 6828 (1988) (amended § 3008, Oct. 21, 1980); see H.R.Conf.Rep. No. 96-1172, 96th Cong., 2d Sess. 36, reprinted in 1980 U.S.Code Cong. & Admin.News 5019, 5035. Further, the Lutz court's use of SARA's legislative history is, on its face, inapposite. The court quotes legislative history suggesting that the citizen suit provision was intended to correct violations and not provide for recovery of damages. Lutz, 718 F.Supp. at 421. It is clear that the citizen suit provision does not authorize recovery of personal damages suffered by plaintiffs. It is equally clear that the provision authorizes courts to impose civil penalties payable to the government. The Lutz court was confusing limitation of damage recovery with limitation of actions to wholly past violations.

[FN96]. Section 103(f) provides that notification is not required for a continuous release, stable in quantity and rate, if notification has been given under § 103(a) for a "period sufficient to establish the continuity, quantity, and regularity" of the release. 42 U.S.C. § 9603(f) (1988). In the case of such a continuous release, however, notification must be given annually or when there has been a statistically significant increase in the quantity of a hazardous substance above that previously reported or occurring. Id.

EPA has not promulgated regulations implementing this "continuous reporting" requirement. The Agency first requested comments on a proposed rule in May 1983. EPA recently published a new request for comments on this issue. 53 Fed.Reg. 12,868 (1988). EPA has stated that until it promulgates a final regulation, persons are to be governed by the language of the statute. Id.

[FN97]. It is not completely clear whether courts may impose penalties for past violations after jurisdiction has been established based on current violations. See Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd., 890 F.2d 690 (4th Cir.1989), rev'g 688 F.Supp. 1078 (E.D.Va.1988) (Fourth Circuit reverses district court conclusion that penalties may be imposed for wholly past violations); Public Interest Research Group of New Jersey, Inc. v. Carter-Wallace, Inc., 684 F.Supp. 115 (D.N.J.1988) (court may impose penalties for past violations of expired NPDES permit if permit conditions have been

continued into current permit).

[FN98]. See generally Johnson, Health Effects of Hazardous Wastes: The Expanding Functions of the Agency for Toxic Substances and Disease Registry, 18 Env'tl.L.Rep. (Env'tl.L.Inst.) 10,132 (1988) (ATSDR works closely with EPA in removing hazardous substances from the environment and preventing adverse human health effects). In a recent article, a former attorney for the ATSDR discusses the actual impact of ATSDR toxicological profiles on CERCLA site cleanup and toxic tort litigation. Siegel, Integrating Public Health Into Superfund: What Has Been the Impact of the Agency for Toxic Substances and Disease Registry?, 20 Env'tl.L.Rep. (Env'tl.L.Inst.) 10,013 (1990). The author notes that there have been no citizen suits filed to date to compel the ATSDR to perform nondiscretionary duties, but states that the failure of the ATSDR to meet health assessment deadlines means that "ATSDR's vulnerability to possible citizen suits in this area will increase." *Id.* at 10,018. Additionally, the author describes the limited use of toxicological profiles in litigation involving CERCLA site cleanup and notes that the effect of the toxicological profiles on toxic tort litigation has been minimal. He states that "the expectations that ATSDR activities would greatly aid the work of plaintiffs in toxic tort litigation have not materialized," but he notes that the role of ATSDR in toxic tort litigation may increase. *Id.* at 10,018-19.

[FN99]. The ATSDR apparently got off to a slow start when established following the adoption of CERCLA in 1980. In Environmental Defense Fund, Inc. v. Heckler, 13 Env'tl.L.Rep. (Env'tl.L.Inst.) 20,630, 20,630 (D.D.C.1983), the court approved a consent decree resolving litigation brought by a variety of litigants to compel the ATSDR to comply with its mandatory duties under CERCLA § 104(i), 42 U.S.C. § 9604(i) (1988).

[FN100]. 42 U.S.C. § 9604(i)(2) (1988). CERCLA, as amended by SARA, establishes certain requirements for EPA and ATSDR with regard to hazardous substances that are most commonly found at facilities on the CERCLA National Priorities List (NPL). Section 104(i)(2) of CERCLA requires that the two agencies prepare a list of at least 100 hazardous substances, in order of priority, that are most commonly found at NPL facilities and that the agencies determine are posing the most significant potential threat to human health. *Id.* The agencies complied with that requirement with the publication of the priority list of 100 substances. 52 Fed.Reg. 12,866 (1987). Section 104(i)(2) of CERCLA also requires the agencies to revise the priority list no later than October 17, 1988. 42 U.S.C. § 9604(i)(2) (1988). Such revision shall include, in order of priority, the addition of 100 or more such hazardous substances. *Id.* The revised priority list containing an additional 100 substances and a summary of the procedure used to assemble the list was published on October 20, 1988. 53 Fed.Reg. 41,280 (1988). ATSDR has also announced the expected availability of toxicological profiles of an additional twenty-five substances. 53 Fed.Reg. 51,192 (1988).

[FN101]. 42 U.S.C. § 9604(i)(3) (1988).

[FN102]. *Id.* § 9604(i)(5).

[FN103]. *Id.*

[FN104]. *Id.* § 9604(i)(6)(A).

[FN105]. *Id.* § 9604(i)(6)(B).

[FN106]. *Id.* § 9604(i)(6)(F).

[FN107]. For a general discussion of toxicological information in tort litigation, see In re Agent Orange Prod. Liab. Litig., 597 F.Supp. 740 (E.D.N.Y.1984); M. DORE, LAW OF TOXIC TORTS § 26.02 (1989).

[FN108]. 42 U.S.C. § 9659(a) (1988).

[FN109]. *Id.* at § 9613(h).

[FN110]. *Id.* § 9613(h)(4) (emphasis added).

[FN111]. See H.R.REP. NO. 99-253(III), 99th Cong., 2d Sess. 22, reprinted in 1986 U.S.CODE CONG. & ADMIN.NEWS 3038, 3045.

[FN112]. Walls v. Waste Resources Corp., 761 F.2d 311, 318 (6th Cir.1985).

[FN113]. One court noted that "[t]o introduce the delay of court proceedings at the outset of a cleanup would conflict with the strong congressional policy that directs cleanups to occur prior to a final determination of the parties' [[sic] rights and liabilities." Wagner Seed Co. v. Daggett, 800 F.2d 310, 315 (2d Cir.1986).

[FN114]. See Dickerson v. EPA, 834 F.2d 974, 977-78 (11th Cir.1987); Barnes v. U.S. Dist. Court, 800 F.2d 822 (9th Cir.1986); Wagner Seed Co. v. Daggett, 800 F.2d 310, 314-15 (2d Cir.1986); Wheaton Indus. v. EPA, 781 F.2d 354, 356-57 (3d Cir.1986); Lone Pine Steering Comm. v. EPA, 777 F.2d 882, 885-88 (3d Cir.1985); J.V. Peters & Co. v. EPA, 767 F.2d 263, 264-65 (6th Cir.1985).

[FN115]. Provisions of § 113 that limit pre-enforcement review of cost recovery actions and enforcement of 106 orders "reiterate the current ability of affected parties to obtain review of the Administrator's selection of response actions" H.R.Rep. No. 99-253(III), 99th Cong., 2d Sess. 22, reprinted in 1986 U.S.Code Cong. & Admin.News 3038, 3045.

[FN116]. In Cabot Corp. v. EPA, 677 F.Supp. 823, 828-29 (E.D.Pa.1988), the court wrote that "[d]ue process rights of PRPs are protected by PRPs' eventual opportunity to contest unnecessary costs that EPA attempts to recover from them." See Wagner Seed Co. v. Daggett, 800 F.2d 310, 314-16 (2d Cir.1986); Lone Star Steering Comm. v. EPA, 777 F.2d 882, 887 (3d Cir.1985).

[FN117]. See supra note 85.

[FN118]. See Wagner Seed Co. v. Daggett, 800 F.2d 310, 316 (2d Cir.1986).

[FN119]. For a discussion of CERCLA's substantive requirements for the cleanup of a site, see infra notes 33-35 and accompanying text.

[FN120]. OFFICE OF TECHNOLOGY ASSESSMENT, ARE WE CLEANING UP?: 10 SUPERFUND CASE STUDIES 1-4 (June, 1988)[hereinafter OTA REPORT].

[FN121]. Id.

[FN122]. 42 U.S.C. § 9622(d) (1988). Courts have recognized their authority to engage in a substantive review of the proposed cleanup plan. See generally United States v. Conservation Chem. Corp., 681 F.Supp. 1394 (W.D.Mo.1988) (discussing standards for review of proposed consent decree in CERCLA action and reviewing propriety of specific cleanup proposals contained in proposed consent decree); United States v. Akzo Coatings of Am., 30 Env't Rep.Cas. (BNA) 1361 (E.D.Mich.1989) (cleanup plan complies with state antidegradation requirement and selection of cleanup remedy is not arbitrary and capricious). The extent to which courts will allow intervention by citizens in proceedings involving review of a consent decree or the extent to which the court will consider comments submitted on the consent decree remains to be seen. See In re Acushnet River & New Bedford Harbor: Proceedings re alleged PCB Pollution, 712 F.Supp. 1019, 1023 (D.Mass.1989) (allowing intervention by environmental group in action for court approval of proposed consent decree for purposes of arguing, among other things, legal requirements of consent decree and legal requirements for cleanup under CERCLA). Indeed, review of consent decrees may become the most significant vehicle for reviewing the substance of a cleanup plan. Through SARA, Congress provides significant incentives to PRPs to enter settlement agreements with the government. Settling parties, for example, can receive covenants not to sue by the government, 42 U.S.C. § 9622(f) (1988), and protection from contribution action by nonsettling parties, id. § 9613(f)(2). Given these incentives, future CERCLA cleanups are likely increasingly to involve settlement agreements for which court approval will be required.

[FN123]. 42 U.S.C. § 9613(h)(4) (1988).

[FN124]. See Alabama v. EPA, 871 F.2d 1548, 1557 (11th Cir.1989).

[FN125]. Id. at 1560. This case involved a challenge by the state of Alabama to EPA's decision to import

into Alabama contaminated wastes from a Superfund site in Texas. This case raised the classic "NIMBY" (Not in My Back Yard) concerns that Alabama was acting not because of concerns about the propriety of the cleanup decision but simply to protect its parochial interests. See *infra* notes 150-159 and accompanying text for a discussion of possible limitations on challenges by citizens raising NIMBY concerns.

[FN126]. See, e.g., *Neighborhood Toxic Cleanup Emergency v. Reilly*, 716 F.Supp. 828 (D.N.J.1989) (although the statutory language clearly states that review is unavailable until action is taken, the provision is not entirely clear about what constitutes action taken); *Frey v. Thomas*, 28 Env't Rep.Cas. (BNA) 1660, 1662 (S.D.Ind.1988) (statute does not define when citizen may bring suit); *Schalk v. Thomas*, 28 Env't Rep.Cas. (BNA) 1655, 1656-57 (S.D.Ind.1988) ("finding that the statute is not entirely clear about just when in the course of a remedial action a citizen's suit may be brought, the court will look to the legislative history of this section").

[FN127]. The Conference Committee Report, describing the nature of the action that must be taken before judicial review, states:

In new section 113(h)(4) of the substitute, the phrase "removal or remedial action taken" is not intended to preclude judicial review until the total response action is finished if the response action proceeds in distinct and separate stages. Rather an action under section 310 would lie following completion of each distinct and separable phase of the cleanup. For example, a surface cleanup could be challenged as violating the standards or requirements of the Act once all the activities set forth in the Record of Decision for the surface cleanup phase have been completed Any challenge under this provision to a completed stage of a response action shall not interfere with those stages of the response action which have not been completed.

H.R.Conf.Rep. No. 99-962, 99th Cong., 2d Sess. 224, reprinted in 1986 U.S.Code Cong. & Admin.News 3276, 3317.

[FN128]. *Id.* The report stated:

This provision [section 113] is not intended to allow review of the selection of a response action prior to completion of the action: the provision allows for review only of an "action taken" . . . (italics added). Thus, after the [Remedial Investigation Feasibility Study] has been completed, the remedial action has been selected and designed, and the construction of the selected action has begun, persons will be able to maintain suit to ensure that a specific on-the-ground implementation of the response action is consistent with the requirements of the Act. For example, a suit under this provisions [sic] may be appropriate where a specific aspect of the remedial action, which has been taken, in fact fails to attain a standard required under this Act. The Committee emphasizes that this paragraph is not intended to allow delay of the clean-up and that, in actions under this paragraph, courts should not entertain claims to re-evaluate the selection of remedial action. Also, in reviewing actions under this subsection, the courts should use their powers to ensure that such review does not disrupt clean-up remedies.

H.R.Rep. No. 99-253(III), 99th Cong., 2d Sess. 23, reprinted in 1986 U.S.Code Cong. & Admin.News 3038, 3046 (emphasis in original).

[FN129]. 132 CONG.REC. H9600 (daily ed. Oct. 8, 1986). Representative Roe stated:

One of the most important issues addressed by the legislation is the timing of citizens' suits challenging illegal EPA decisions. Such suits would involve allegations that the agency has violated the cleanup standards and other requirements of the law and that a citizen's health and environment would be threatened if the agency was allowed to continue with its illegal acts.

The legislation allows citizens to bring a lawsuit under section 310 as soon as the agency announces its decision regarding how a cleanup will be structured. A final cleanup decision, or plan, constitutes the taking of action at a site, and the legislative language makes it clear that citizens' suits under Section 310 will lie alleging violations of law and irreparable injury to health as soon as--and these words are a direct quote--"action is taken."

It is crucially important to maintain citizens' rights to challenge agency actions, or final cleanup plans, before such plans are implemented because otherwise the agency could proceed in blatant violation of the law and waste millions of dollars of Superfund money before a Court had considered the illegality. *Id.*

[FN130]. Senator Stafford also explained that "[i]t is crucial, if it is at all possible, to maintain citizens' rights to challenge response actions, or final cleanup plans, before such plans are implemented even in

part because otherwise the response could proceed in violation of the law" 132 CONG.REC. S14, 898 (daily ed. Oct. 3, 1986).

[FN131]. Representative Roe stated, for example, that:

[w]hen the essence of a lawsuit involves contesting the liability of the plaintiff for cleanup costs, the court should apply the other provisions of section 113(h), which require such plaintiff to wait until the Government has filed a suit under section 106 or 107 to seek review of the liability issue. The courts should not be misled by any effort to present such cases as legitimate "citizens' suits" challenging illegal action by the agency.

132 CONG.REC. H9600 (daily ed. Oct. 8, 1986); see 132 CONG.REC. S14,898 (daily ed. Oct. 3, 1986) (remarks of Senator Stafford indicating that courts must be able to draw appropriate distinctions between PRPs and affected citizens).

[FN132]. See 132 CONG.REC. H9587 (daily ed. Oct. 8, 1986) (remarks of Representative Florio).

[FN133]. Representative Glickman stated:

Clearly the conferees did not intend to allow any plaintiff, whether the neighbor who is unhappy about the construction of a toxic waste incinerator in the neighborhood, or the potentially responsible party who will have to pay for its construction, to stop a cleanup by what would undoubtedly be a prolonged legal battle. It was for this very reason that the conferees included section 113(h).

132 CONG.REC. H9583 (daily ed. Oct. 8, 1986). Representative Glickman did, however, state that this result was based on the statutory provisions for effective public participation in the government decisionmaking process. *Id.*

[FN134]. See 132 CONG.REC. S14,928-29 (daily ed. Oct. 3, 1986) (remarks of Senator Thurmond); 132 CONG.REC. S14,917 (daily ed. Oct. 3, 1986) (remarks of Senator Mitchell).

[FN135]. 677 F.Supp. 823 (E.D.Pa.1988).

[FN136]. Considering the availability of citizens' suits to PRPs, the court stated:

Although PRPs are not in terms barred from bringing citizen suits, Congress' decision to enable EPA to clean up hazardous waste sites prior to litigating the allocation of the expenses of those cleanups supports a distinction between citizen suits alleging irreparable harms and those claiming monetary damages. Health and environmental hazards must be addressed as promptly as possible rather than awaiting the completion of an inadequately protective response action.

Id. at 829.

[FN137]. 659 F.Supp. 1269 (D.Del.1987).

[FN138]. *Id.* at 1290 n. 39.

[FN139]. *Id.*; see Chemical Waste Management v. EPA, 673 F.Supp. 1043 (D.Kan.1987) (court held that § 113(h) does not bar action by waste disposal company from challenging EPA policy regarding qualification of its off-site facility to accept wastes from Superfund sites, relying in part on distinction between company and PRPs in deciding whether § 113(h) applied to bar company from bringing its challenge).

[FN140]. 28 Env't Rep.Cas. (BNA) 1655 (S.D.Ind.1988).

[FN141]. 28 Env't Rep.Cas. (BNA) 1660 (S.D.Ind.1988).

[FN142]. *Id.* at 1664.

[FN143]. *Id.*

[FN144]. *Id.* at 1665

[FN145]. 716 F.Supp. 828 (D.N.J.1989).

[FN146]. The court noted that several residents had written to the court asking that the cleanup be

allowed to continue. Id. at 830.

[FN147]. Id. at 833.

[FN148]. Id. at 834.

[FN149]. See *infra* notes 154-157 and accompanying text for a discussion of the possible significance of the government's failure to provide an adequate opportunity for public participation in allowing pre-implementation review by citizens.

[FN150]. See Alabama v. EPA, 871 F.2d 1548, 1554-60 (11th Cir.1989).

[FN151]. See *infra* notes 120-122 and accompanying text.

[FN152]. See *supra* notes 109-115 and accompanying text.

[FN153]. See *supra* notes 119-122 and accompanying text.

[FN154]. Additionally, citizens may be able to claim that failure meaningfully to consider implementation of a "permanent" solution, as required by section 121 of CERCLA, constitutes violation of a nondiscretionary duty.

[FN155]. Representative Glickman stated:

the conferees decided to ensure expeditious cleanups by restricting such preimplementation review. To balance this restriction on judicial review of the remedy selected by the EPA, the conferees included provisions that require EPA to develop extensive procedures for public participation in the selection of the cleanup plan and the compilation of an administrative record.
132 CONG.REC. H9583 (daily ed. Oct. 8, 1986).

[FN156]. Under the 1986 amendments, EPA issues its decision setting out the appropriate cleanup remedy for a particular site in a Record of Decision (ROD). The Act requires EPA to publish notice and a brief analysis of the proposed plan, make the plan available for public review, and provide a "reasonable opportunity" for public comment. 42 U.S.C. § 9617(a)(1) (1988). The notice and analysis must "include sufficient information as may be necessary to provide a reasonable explanation of the proposed plan and alternative proposals considered." Id. § 9617(a).

[FN157]. In *Lopez v. Layton*, No. DR-88-CA-25 (W.D.Tex.1988), three residents have brought a citizen suit action seeking to compel the EPA Region VI Administrator to fulfill alleged mandatory duties regarding the cleanup of the Crystal City Airport Superfund site. The plaintiffs also allege that they were denied adequate public participation, as required by § 117 of the Act. As of this writing, the parties were waiting for a ruling on the EPA's Motion to Dismiss due to lack of subject matter jurisdiction. EPA's motion is based on the timing of review sections of § 113(h).

[FN158]. Case law under other environmental statutes suggests that courts have this discretion in fashioning remedies to statutory violations. See Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982).

[FN159]. In *Weinberger* the Court discussed the necessary prerequisites for injunctive relief: "[i]t goes without saying that an injunction is an equitable remedy. It 'is not a remedy that issues as of course,' The Court has repeatedly held that the basis for injunctive relief in the federal courts has always been irreparable injury and the inadequacy of legal remedies." Id. at 311-12.

United States District Court,
N.D. Illinois,
Eastern Division.

Frank P. BATTAGLIA, Trustee, and Battaglia Distributing Corp., Inc., Plaintiffs,
v.

Carol M. BROWNER, Administrator, U.S. Environmental Protection Agency, Defendant.

No. 96 C 6024.

April 30, 1997.

Property owner sued Administrator of Environmental Protection Agency (EPA) pursuant to citizen suit provision of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) for allegedly wrongfully designating property as facility and listing it on CERCLA Information System (CERCLIS). Administrator moved for judgment on pleadings. The District Court, Bucklo, J., held that property owner could not sue administrator for maladministration of CERCLA under citizens suit provision. Judgment for defendant.

West Headnotes

KeyCite Notes



149E Environmental Law

149EIX Hazardous Waste or Materials

149Ek458 Private Right of Action; Citizen Suits

149Ek461 k. Response and Cleanup; Monetary Relief. Most Cited Cases
(Formerly 199k25.15(4.1) Health and Environment)

Term "violation" in CERCLA's citizen suit provision does not include Environmental Protection Agency Administrator's maladministration of CERCLA, and thus, alleged maladministration cannot be challenged through CERCLA citizens suit. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 310, 42 U.S.C.A. § 9659.

***690. MEMORANDUM OPINION AND ORDER**

BUCKLO, District Judge.

Frank P. Battaglia sued Carol M. Browner, the Administrator of the Environmental Protection Agency ("EPA"), pursuant to the "citizens suit" provision of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9659(a)(1), complaining that the defendant wrongfully designated his property as a "facility," and wrongfully listed it in and refused to delete it from the CERCLA Information System ("CERCLIS"). The Administrator moved for judgment on the pleadings under Fed.R.Civ.P. 12(c).

A judgment on the pleadings is appropriate when the moving party is clearly entitled to judgment as a matter of law. In re Amica, Inc., 130 B.R. 792, 795 (N.D.Ill.1991). This is such a case. Under CERCLA, any person may commence a civil action on his own behalf-

(1) against any person (including the United States and any other governmental instrumentality or agency, ...) who is alleged to be in violation of any standard, regulation, condition, requirement, or order which has become effective ...; or

(2) against the President or any other officer of the United States (including the Administrator of the Environmental Protection Agency and the Administrator of the ATSDR) where there is alleged a failure of the President or of such other officer to perform any act or duty under this chapter ... which is not discretionary with the President or such other officer.

42 U.S.C. § 9659(a). Mr. Battaglia sues under subsection (1).^{FN1}

FN1. Since Mr. Battaglia does not argue that his suit falls under subsection (2), I will not address that issue. See Selcke v. New England Ins. Co., 2 F.3d 790, 792 (7th Cir.1993) (burden of proof is on party invoking jurisdiction).

Mr. Battaglia relies upon 40 C.F.R. § 300.5, which defines CERCLIS as the EPA's comprehensive data base and data management system that inventories and tracks releases addressed or needing to be addressed by the Superfund program. CERCLIS contains the official inventory of CERCLA sites and supports EPA's site planning and tracking functions. Sites that EPA decides do not warrant moving further in the site evaluation process are given a "No Further Response Action Planned" (NFRAP) designation. This means that no additional federal steps under CERCLA will be taken at the site unless future information so warrants. Sites given a NFRAP designation are placed in a separate archival data base. Inclusion of a specific site or area in the CERCLIS data base does not represent a determination of any party's liability, nor does it represent a finding that any response action is necessary.

Mr. Battaglia complains that the Administrator may not include a site in CERCLIS unless a "release" ^{FN2} occurred on the property, and must remove the site from CERCLIS ***691** after the determination that no "release" occurred. In Mr. Battaglia's case, it is undisputed that no "release" occurred. Therefore, Mr. Battaglia contends, the Administrator did not comply with CERCLA regulations. ^{FN3}

^{FN2}. Release means "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment" of a hazardous substance. 40 C.F.R. § 300.5; 42 U.S.C. § 9601(22).

^{FN3}. Mr. Battaglia also complains that the Administrator wrongfully designated his property as a "facility." A facility is "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located." 40 C.F.R. § 300.5; 42 U.S.C. § 9601(9)(B). Mr. Battaglia maintains that since no "release" ever occurred on his property, its designation as a "facility" was not in compliance with the CERCLA.

This claim is not cognizable under 42 U.S.C. § 9659(a)(1). The Supreme Court interpreted almost identical language in Bennett v. Spear, 520 U.S. 154, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997). Bennett involved a "citizens suit" provision of the Endangered Species Act ("ESA"), which provided, in pertinent part, that

"any person may commence a civil suit on this own behalf-

(A) to enjoin any person, including the United States and any other governmental instrumentality or agency ... who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof; or

.....

(C) against the Secretary [of Commerce or the Interior] where there is alleged a failure of the Secretary to perform any act or duty under [16 U.S.C. §] 1533 ... which is not discretionary with the Secretary." *Id.* at ----, 117 S.Ct. at 1165 (quoting 16 U.S.C. § 1540(g)(1)). Pursuant to 16 U.S.C. § 1536, the Secretary of the Interior, through the Fish and Wildlife Service, determined that a project contemplated by the Bureau of Reclamation would adversely affect a listed species and proposed an alternative. Dissatisfied with the alternative, the plaintiffs sued for violations of § 1536. *Id.* at ---- - ----, 117 S.Ct. at 1159-60. Concluding that suit for violations of that section did not fall under 16 U.S.C. § 1540(g)(1)(A), ^{FN4} the Court explained that § 1540(g)(1)(A) is "a means by which private parties may enforce the substantive provisions of the ESA against regulated parties-both private entities and Government agencies" and "that the term 'violation' does not include the Secretary's failure to perform his duties as administrator of the ESA." *Id.* at ----, 117 S.Ct. at 1166. Otherwise, § 1540(g)(1)(C) would be rendered superfluous, contrary to a "cardinal principle of statutory construction" that every clause of a statute be given effect. *Id.* (quotation omitted).

^{FN4}. Violations of 16 U.S.C. § 1536 expressly do not fall under 16 U.S.C. § 1540(g)(1)(C).

Since the "citizens suit" provision of the ESA is analogous to that of CERCLA, the term "violation" in 42 U.S.C. § 9659(a)(1) does not include the Administrator's "maladministration of (CERCLA)," see *id.* at ----, 117 S.Ct. at 1167, which is what Mr. Battaglia complains about. Judgment is therefore granted in favor of the defendant.

Copr. (C) West 2006 No Claim to Orig. U.S. Govt. Works N.D.Ill.,1997.

Battaglia v. Browner 963 F.Supp. 689, 45 ERC 1671